No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California Corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

On Writ of Certiorari to the California Supreme Court

JOINT APPENDIX.

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PETITION FOR CERTIORARI
FILED MARCH 29, 1985
CERTIORARI GRANTED OCTOBER 15, 1985

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INDEX TO JOINT APPENDIX

Superior Court

OF THE

State of California

County of Riverside

PEOPLE

VS.

ROBERT RUBANE DIAZ

Dept. 14

February 10, 1983

CR-19889

COUNSEL:

District Attorney by: P. MAGERS, Deputy

Public Defender by: J. LEE, Deputy, P. LAHTI, Deputy

S. Waters — Press Enterprise

Reporter: K. SMITH

Proceeding: 995P.C. Motion; 1538.5P.C. Motion; Motion for Correction of Transcript; Motion to Unseal Transcript; and Motion to Conduct Extended Media Coverage.

187 P.C. (Ct I thru XII); Spec. Circum. 190.2(a)(3)P.C.

People represented as indicated above and defendant (custody) present with counsel.

Defendant's motion for correction of transcript is resumed.

Court finds transcript as corrected is correct. Twenty-three partial list of corrections to transcript are deemed addendums to transcript, and ordered filed.

Discussion in closed Court with defendant and defendant's counsel. Court reporter, court clerk and bailiff are present.

In Open Court: Press Enterprise's motion to conduct extended media coverage, and People's motion to unseal transcripts is argued by counsel. Portion of transcript pages 11 and 12, marked as defendant's identification A, and subsequently admitted and defendant's exhibit A. Portion of transcript pages 4235 thru 4237 respectively, marked as defendant's identification B, and subsequently admitted and defendant's exhibit B. Portion of transcript pages 4224 thru 4226 respectively, marked ad defendant's identification C, and subsequently admitted and defendant's exhibit C. Notebook, marked as defendant's identification D, and subsequently admitted as defendant's exhibit D. Tape, marked as defendant's identification E, and subsequently withdrawn and returned to counsel.

Court orders preliminary hearing transcripts to remain sealed. Court further orders Defendant's motion to dismiss information and points and authorities, and People's points and authorities in opposition to motion to be sealed.

Defendant moves to exclude the public and seal the 995P.C. motion and 1538.5P.C. motion. Matter argued by counsel. Motion denied.

Court is adjourned until 02-18-83 at 8:30 A.M. in Dept. 14, for the 995P.C. motion and 1538.5P.C. motion.

BARNARD, Judge
E. JONES, Clerk

Court of Appeal
State of California

FOURTH APPELLATE DISTRICT

DIVISION TWO

PRESS-ENTERPRISE COMPANY,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE,
Respondent.

ROBERT RUBANE DIAZ,
Real Party in Interest.

4 CIVIL 29785
COUNTY NO. CR 19889

Filed: August 18, 1983

THE COURT:

To determine the pending writ proceeding it is necessary for the court to have the sealed transcript of the preliminary hearing in Action No. 19889, entitled *People v. Robert Rubane Diaz,* now pending in the Riverside Superior Court.

The clerk of the Riverside Superior Court is therefore ordered to transmit said transcript to this Court upon receipt of a certified copy of this order.

KAUFMAN, J.
Acting P.J.

In the Supreme Court

OF THE

State of California

PRESS-ENTERPRISE COMPANY,
Petitioner,

VS.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent;

ROBERT RUBANE DIAZ,
Real Party in Interest.

L.A. 31876

Filed: December 31, 1984

In the instant case we consider the appropriate standard to be applied by a magistrate in determining whether the public's right of access to preliminary hearings should be limited due to the risk of impairment of a defendant's right to a fair trial.

The real party in interest, Robert Rubane Diaz, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. He was also charged with special circumstances. At the time of the preliminary hearing there were many representatives of television stations, radio stations and newspapers present. On Diaz' motion pursuant to Penal Code section 868,[1] the court ordered the preliminary hearing closed to the press and public. The preliminary hearing was held over a period of 41 days, and Diaz was held to answer on all charges. The judge sealed all transcripts.

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[1]Unless otherwise indicated, all statutory references are to the Penal Code.

About seven months later, petitioner sought to gain access to the transcripts in the superior court. The prosecution joined in the motion. Diaz opposed, presenting evidence of the widespread publicity given to the case by the media, some of which had continued until the time of the hearing. The judge, concerned that releasing the transcript might require either delay of the proceedings or transfer of the trial to another jurisdiction, pointed out that defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. The judge found that "there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." He ordered that the transcript remain sealed, and petitioner commenced the instant mandamus proceeding.[2]

THE ASSERTED CONSTITUTIONAL RIGHT OF ACCESS

Prior to its 1982 amendment, section 868 provided that upon the request of the defendant, the magistrate shall exclude the public from the preliminary examination. In San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, the statute was upheld against a claim that the federal and state Constitutions give the press and public a right of access to preliminary hearings that may be foreclosed only when outweighed by defendant's interest in a fair trial and that section 868 violated that right because it had no provision for balancing of competing interests in individual cases.

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[2]The trial has been completed. Although technically moot, the case presents an important question affecting the public interest, and review is appropriate. (San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 501, fn. 2.)

In considering the claim of violation of federal constitutional rights, the court recognized that the United States Supreme Court has held that the First Amendment provided a qualified right of public access to the trial and that a majority of justices had recognized a qualified right of access to pretrial hearings such as suppression hearings. (30 Cal.3d at pp. 503-506.) The court pointed out that the basis of the qualified access right was the long history of trials being presumptively open and that the open trial tradition guards against persecution and favoritism, increases public awareness of the judicial process, inspires confidence in the criminal justice system, and serves the cathartic needs of the community. (30 Cal.3d at p. 505.)

In *San Jose Mercury-News,* the court also pointed out that seven of the United States Supreme Court justices had stated that preliminary hearings, unlike trials, were traditionally private at common law and were distinguishable from pretrial suppression hearings. (30 Cal.3d at pp. 504-506.) This court concluded that no right of access arose upon the First Amendment. (30 Cal.3d at p. 506.)

In rejecting the claim of conflict with the California Constitution, the court recognized that state constitutional guarantees may give greater protection to some rights than the federal counterparts, but concluded that the Legislature reasonably gives fair trial rights a preference over access rights in certain classes of proceedings where danger of prejudice is strong and proof on a case-by-case basis appears difficult and that section 868 was a permitted means of protecting defendants' rights to a fair trial free of juror bias.[3] (30 Cal.3d at pp. 506-514.)

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[3]Because they bear on the proper interpretation of section 868 as amended in 1982, the policy concerns which led to the court's conclusion will be discussed in detail in the statutory portion of the opinion.

Petitioner urges that recent decisions of the United States Supreme Court require repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to a preliminary hearing. Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, involved a Massachusetts statute requiring mandatory closure of trial during the testimony of a minor sex victim. The court again relied upon the tradition of trials being open to the press and public, and it asserted that before a state may deny the right of access it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. (457 U.S. at pp. 603-607.) Responding to an argument that trials have not always been open during testimony of minor sex victims, the court in a footnote stated that whether the First Amendment right of access can be restricted in the context of any criminal trial depends not on the historical openness of that type of trial but rather on the state interests assertedly supporting the restriction. (457 U.S. at p. 605, fn. 13.) The court concluded that the Massachusetts statute was not narrowly tailored to accommodate the state's compelling interest in protecting the physical and psychological well-being of a minor and that rather than mandatory closure the state's interest may be protected by a case-by-case determination whether closure is necessary to protect the welfare of the minor. (457 U.S. at p. 608.)

The second case relied upon by petitioner is Press Enterprise Company v. Superior Court (1984) ____ U.S. ____ [78 L.Ed.2d 629, 104 S.Ct. 819], where the court held that an order closing voir dire proceedings was invalid on the ground that the trial judge had failed to consider alternative measures. In a concurring opinion, Justice Stevens stated that the purpose of the access right is assuring freedom of communication on matters

relating to the functioning of government and that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." (____ U.S. at p. ____ [78 L.Ed.2d at p. 742, 104 S.Ct. at p. 828].)

Neither case warrants repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to preliminary hearings. Both cases were concerned with the right of access to trials rather than preliminary hearings. The problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings. In *Press Enterprise Company* the court emphasized that prejudice to the defendant remains the primary concern, stating: "No right ranks higher than the right of the accused to a fair trial." (____ U.S. at p. ____ [78 L.Ed.2d at p. 637, 104 S.Ct. at p. 823].) The main concern asserted in both cases to justify closure was not prejudice to the defendant but the interests of others, i.e., the privacy rights of prospective jurors and the physical and psychological well-being of minor sex victims.

While a footnote in *Globe Newspaper Co.* suggests that historical openness may no longer be an element of the First Amendment access right, the footnote by its own language is limited to trials. (Globe Newspaper Co. v. Superior Court, *supra,* 457 U.S. at p. 605, fn. 13.) The subsequent *Press Enterprise Company* decision not only indicates that one of the bases of the access right to trials as established by Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555 is that trials were open at the time of the adoption of the First Amendment but also devotes the first portion of the opinion to establish that at the time of the adoption of the First Amendment public jury selection was the common practice in America. While the

statement of Justice Stevens relied upon by petitioner is to the effect that the access right is not limited to trials, it does not establish that historical conditions are irrelevant because he also states that the question before the court " 'focuses . . . on First Amendment values and the historical backdrop against which the First Amendment was enacted.' " (____ U.S. at p. ____ [78 L.Ed.2d at p. 642, 104 S.Ct. at p. 828].)

We conclude that petitioner and amici have failed to establish a basis for repudiating the conclusion in the 1982 decision in *San Jose Mercury-News* that the First Amendment access right does not extend to preliminary hearings. In addition, petitioner and amici have not pointed to any matters warranting repudiation of the portion of *San Jose Mercury-News* relating to the California Constitution.

THE STATUTORY ACCESS RIGHT

Shortly after the decision in 1982 in *San Jose Mercury-News,* the Legislature amended section 868 to delete the defendant's absolute right to closure and to establish a right of access to preliminary hearings. The amended section reads: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination [all but certain enumerated officials, defendant and his counsel, and the prosecuting witness and a friend.]" (Italics added.)

The parties and amici dispute the appropriate standard to be applied by the magistrate in determining whether exclusion is "necessary" in order to protect the defendant's right to a fair and impartial trial. Some of the language in the brief submitted by amici suggests that

exclusion is appropriate only if the magistrate finds that failure to exclude will result in an unfair trial.

Petitioner argues for the test set forth in United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167 where the court stated that an "accused who seeks closure must establish 'that it is strictly and inescapably necessary in order to protect the fair trial guarantee.' This burden may be discharged by demonstrating: (1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.'" *Brooklier* did not involve preliminary hearings but rather hearings on motions to suppress and the juror voir dire. The *Brooklier* test is based on the dissenting opinion of Justice Blackmun in Gannett Co. v. DePasquale (1979) 443 U.S. 368, 406, 440-446. Justice Blackmun, joined by Justices Brennan, White and Marshall, urged that the Sixth Amendment right to a public trial was not personal to the defendant but established an access right for the public. The majority rejected that view.[4]

[4]Justice Blackmun recognized that in some cases of suppression hearings closure might be justified. "The trial judge faced with a closure motion has the more difficult task of looking into the future. I do not mean to suggest that only in the egregious circumstances of cases such as *Estes* and *Sheppard* would closure be permissible. But to some extent the harm that the defendant fears from publicity is also speculative."

"If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude

Defendant urges that the proper test is that the preliminary hearing must be closed upon a defendant's request if the magistrate finds "a reasonable likelihood" of substantial prejudice which would impinge upon the right to a fair trial. The trial court purported to apply this test. The test appears to be based on the concurring opinion of Justice Powell in Gannett Co. v. DePasquale, *supra*, 443 U.S. 368, 397-403. He joined the majority opinion in holding that the Sixth Amendment did not confer access rights but concluded that the First Amendment provides a limited right of access to suppression hearings. He rejected Justice Blackmun's test for closure on the ground that it was inflexible and could prejudice defendant's rights and disserve society's interest in the fair and prompt disposition of criminal trials. He concluded that the test is whether "a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury." (443 U.S. at p. 400.) He stated that it is the defendant's responsibility to show that public access would interfere with the fairness of his trial but that those opposing closure have the burden of showing that alternative procedures are available that would eliminate the danger of prejudice.[5]

the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to supress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at pp. 444-445.)

[5]In *Gannett Co.* the trial judge found "a reasonable probability" of prejudice, and the majority held this would overcome a First Amendment right of access.

The test of reasonable likelihood that the defendant will not receive a fair and impartial trial is used in considering motions for change of venue. (Odle v. Superior Court (1982) 32 Cal.3d 932, 937; Martinez v. Superior Court (1981) 29 Cal.3d 574, 578.) Also the test has been used with respect to gag orders. (Younger v. Smith (1973) 30 Cal.App.3d 138, 159-164; see Brian W. v. Superior Court (1978) 20 Cal.3d 618, 624, fn. 7.) The Legislature has established a standard of reasonable likelihood of prejudice to the defendant to be applied in determining whether a grand jury transcript should be unsealed. (§ 938.1, subd. (b).) The test has also been applied in determining whether a purported confession should be suppressed pending trial. (Cromer v. Superior Court (1980) 109 Cal.App.3d 728, 731 et seq.)

The legislative history of the amendment to section 868 shows that the Legislature intended the courts to determine the appropriate standard. Assembly Bill No. 277 as originally introduced and as adopted opens preliminary hearings unless the magistrate finds it "necessary" to close to protect the defendant's right to a fair trial. As originally worded, the bill provided that the finding that it is necessary to close "would require a demonstration of a clear and present danger of irreparable damage to the defendant's right to a fair and impartial trial, that the alternatives to closure will not adequately protect that right, and that the closure will effectively protect against the perceived harm." In the Assembly, the second condition relating to alternatives to closure was deleted before the bill was passed.

Clear and present danger language was contained, although in slightly different form, in the bill passed by the Senate, but the Conference Committee report was rejected in the Assembly, and the bill was amended in the Assembly to substitute "preponderant probability" for

"clear and present danger." The bill was amended in a second Conference Committee report to delete all of the language defining "necessary," and as finally approved, the amendment to section 868 provides no definition of "necessary." (The bill as enacted also dealt with matters other than the amendment of section 868.)

The deletion of any definition of the word "necessary" shows that, while the Legislature concluded that preliminary hearings should be public unless there was conflict with the defendant's right to a fair trial, the Legislature intended that the courts should determine the standard to be applied in weighing the public's right of access against the defendant's fair trial right.

In *San Jose Mercury-News*, the court detailed the policy factors in favor of holding preliminary hearings in public: Exposure of governmental functions to public view serves societal interests in a democratic government. Open preliminary hearings guard against persecution and favoritism, increase public awareness of the judicial process, inspire confidence in the criminal justice system, and serve the cathartic needs of the community. Preliminary hearings are an important step in the accusatorial process. There are many similarities to the trial; witnesses may be cross-examined, each side has an incentive to prevail, and the hearing may reveal weaknesses in the prosecution or defense, forecasting the ultimate disposition.

Often the preliminary hearing turns out to be the only judicial proceeding of substantial importance that takes place during a criminal prosecution because so many cases are disposed of without trial. The hearing often provides the forum for issues involving police misconduct and exclusion of evidence. The court also pointed out that pretrial publicity, even pervasive adverse publicity, does

not invariably lead to an unfair trial. (30 Cal.3d at pp. 505, 509-514.)

On the other hand, the court in *San Jose Mercury-News* pointed to several concerns militating against a public preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing. While the Legislature has since amended section 868 to delete the defendant's absolute right to closure, the concerns enumerated in *San Jose Mercury-News* obviously bear upon our determination of the appropriate standard to be applied under the amended statute.

The concerns militating in favor of a right of closure recognized by the court include: The evidence at the preliminary hearing may be one-sided and misleading because the testimony is often that of the prosecution only — the defense remaining silent if it appears that reasonable or probable cause has been established. Many nonlawyers may not be aware of the function of a preliminary hearing which is not a trial with the danger that they may ascribe to a one-sided hearing the legitimacy and credibility of a trial. Magistrates may err in their evidentiary hearings, and there is a danger that highly prejudicial evidence which will be inadmissible at trial will be admitted or adverted to and reported by the media.

In addition factual, relevant reporting, no less than inflammatory publicity, may threaten a defendant's right to a fair trial by producing a jury pool "within which a defendant's guilt has already been ascribed." (30 Cal.3d at p. 512.)

Because the preliminary hearing takes place at an early stage in the criminal prosecution, it may be difficult or impossible for the defendant to make a showing of the prejudice which will occur from publicity. At an early stage, the community reaction and the media attitude may

not be clear, and the defendant may have little knowledge of the prosecution's strategy and evidence. "Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on speech and press rights. (See, e.g., Nebraska Press Assn., *supra,* 427 U.S. 539, 556-560 [49 L.Ed.2d 683, 695-698]; Brian W., *supra,* 20 Cal.3d 618, 624, fn. 7.) Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; Brian W., *supra,* 20 Cal.3d at p. 625.)" (San Jose Mercury-News v. Municipal Court, *supra,* 30 Cal.3d at pp. 511-513.)

We reject the view that a magistrate in ruling on a request to close the preliminary examination must find that in fact an open preliminary hearing will result in a denial of fair trial. At the time that the magistrate makes the finding predictions must be made as to the amount and nature of publicity which will result from an open preliminary hearing and as to the impact of the anticipated publicity. The legislative history of the two standards contemplated, "clear and present danger" and "preponderant probability," indicates that the Legislature had in mind a lesser standard than a factual finding of actual preju- dice.

The legislative history of the two standards contemplated, as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. "Necessary" is often used in the sense of essential (Webster's New Internat. Dict. (2d ed. 1959) p. 1635), and the terms "clear and present danger" and "preponderant possibility" reflect that a substantial

showing of potential prejudice must be made before the preliminary hearing may be closed.

The test urged by defendant, a reasonable likelihood of substantial prejudice, and the test urged by petitioner, a substantial probability of irreparable damage, meet the requirement of a substantial showing of potential prejudice. While there is some difference between the two standards, it obviously is not very great.

Weighing the language of section 868, the legislative history, and the policy factors discussed above, we conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal Code section 868 makes clear that the primary right is the right to a fair trial and that the public's right of access must give way when there is conflict.

Once a defendant establishes a reasonable likelihood of substantial prejudice, there is a clear and present danger of prejudice, and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice. But if the showing in opposition fails to overcome the defendant's showing that there is a reasonable likelihood of substantial prejudice, it would be improper for the magistrate to jeopardize the fair trial right by permitting a public preliminary hearing. The primacy of the right to fair trial, viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial right by an open hearing.

The peremptory writ of mandate is denied. The alternative writ, having served its purpose, is discharged.

BROUSSARD, J.

WE CONCUR:
BIRD, C.J.
MOSK, J.
KAUS, J.
REYNOSO, J.

PRESS-ENTERPRISE COMPANY
v.
SUPERIOR COURT
L.A. 31876

CONCURRING OPINION BY GRODIN, J.

The majority's determination that the First Amendment provides no right of access to preliminary hearings is unnecessary to the decision of this case, and I do not join in it. The only constitutional question presented is whether the First Amendment requires a *greater* right of access than the Legislature has seen fit to establish by statute. I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the "rule rather than the exception" (typed op., 16), the exception existing only when exclusion of the public is, to use the language of the statute, "necessary in order to protect the defendant's right to fair and impartial trial."

I agree also that the determination of "necessity" must inevitably be a matter of judgment based upon probabilities, and that the phrase "substantial showing of potential prejudice" (or, what amounts to the same thing, a "reasonable likelihood of substantial prejudice") constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that.

GRODIN, J.

PRESS-ENTERPRISE COMPANY
v.
SUPERIOR COURT
L.A. 31876

CONCURRING AND DISSENTING OPINION BY LUCAS, J.

I concur in the judgment but dissent to the majority's analysis. By reason of the 1982 amendment to Penal Code section 868, preliminary hearings are required to be "open and public" unless the magistrate expressly finds that exclusion of the public is "necessary" to protect the defendant's right to a fair and impartial trial. In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of *necessity*. In my view, the majority's new standard improperly ignores the statutory language.

As the majority concedes, "The legislative history . . . as well as its use of the word 'necessary,' makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. 'Necessary' is often used in the sense of essential . . . ." (*Ante*, p. ____ [maj. opn. at p. 16].) Although a showing of *actual* prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a *substantial probability* of prejudice. (See United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here.

As the trial is completed and the case is now moot, I concur in the judgment denying the peremptory writ.

LUCAS, J.

PRESS-ENTERPRISES CO.
v.
SUPERIOR COURT RIVERSIDE
L.A. No. 31876

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For Real Party In Interest:	LAWRENCE B. LEWIS, *Public Defender* 3536 Tenth Street Riverside, CA 92501 (714) 787-2707
Trial Court & No.:	Riverside County Crim. 19889
Superior Court Judge:	The Honorable JOHN H. BARNARD

EXCERPT FROM
PRELIMINARY HEARING

REPORTER'S DAILY TRANSCRIPT

BEFORE HONORABLE HOWARD DABNEY,
JUDGE

DIVISION 20

Tuesday, July 6, 1982

APPEARANCES OF COUNSEL:

For the People:	R.D. THOMPSON *Acting District Attorney* By: PATRICT MAGERS *Deputy District Attorney* 4080 Lemon Street Riverside, California 92501
For the Defendant:	MALCOLM S. MACMILLAN *Public Defender* By: CLARENCE HEWATT JOHN LEE *Deputy Public Defenders* 3536 Tenth Street Riverside, California 9250
Reported by:	ETHEL I. BROOKS, CSR No. 5639 EVA I. YAKUTIS, CSR No. 5084

THE COURT: Ladies and gentlemen, we are back on the record. All the parties and the Defendant are present.

Mr. Hewatt, first of all — Mr. Magers, I'd like simply to state for the record that some time ago there was an agreement orally among the parties in the court that there would be a daily transcript and the Court is at this time

ordering that transcript. I don't believe there is anything on the record.

I'd like to take any other motions as far as publicity are concerned now.

MR. HEWATT: At this time, after conferring with my client, I would like to exclude all press and prospective witnesses under 868 from the courtroom.

I feel in the best interest of my client and possibly because of the fact that this case eventually will be tried in the County of Riverside, that the press be excluded from the proceedings in this matter.

THE COURT: Mr. Magers, do you have anything to say?

MR. MAGERS: I'll submit it to the Court.

THE COURT: All right, ladies and gentlemen, not only is there a statute in the Penal Code that states it's the Court's obligation under this circumstance but there is also a case of the United States Supreme Court called Ganat Company versus DePasqual, citation is 1979, 443 U.S. 368, which indicates that it is a trial court's affirmative constitutional duty to protect the Defendant's due process rights which include the right to a fair trial. And so beyond the statute this Court has an obligation and based on that United States Supreme Court case and the statue, I feel that in this particular case and past appearances in the Court, there has been national publicity. As a result of Court appearances, that each Court appearance of the Defendant, media has been present and has been reported in the media and I feel that because of the Preliminary Hearing in which many times the defenses are not presented to show the Defendant's side of the issue, that only one side may get reported in the media.

Therefore, I find that the motion should be granted to protect the Defendant's right to a fair trial, and impartial trial.

Therefore, the media cannot be present nor can the public. They are — you are excluded, ladies and gentlemen. There are certain exceptions to that, of course, and that's necessary court personnel that are required.

But, ladies and gentlemen, I am sorry; however, you will have to remove yourselves from the courtroom and during the pendency of this proceedings.

So, we will recess until everyone is absent.

(Recess taken.)

THE COURT: Back on the record. All the parties are present and counsel.

I'd like to make sure the record reflects that additional personnel are in the courtroom. And I understand that there has been a request by defense to have Mrs. Diaz present, Mr. Diaz's wife, in the courtroom.

EXCERPT FROM

PRELIMINARY HEARING

Before the Honorable HOWARD DABNEY

DIVISION 20
August 31, 1982

Appearances:

FOR THE PEOPLE: R. DEAN THOMPSON
Acting District Attorney
By: PATRICK MAGERS
Deputy District Attorney
4080 Lemon Street
Riverside, California 92501

FOR THE DEFENDANT: MICHAEL B. LEWIS
Acting Public Defender
By: CLARENCE HEWATT
JOHN LEE
Deputy Public Defenders
3536 Tenth Street
Riverside, California 92501

REPORTED BY: ETHEL I. BROOKS, CSR No. 5639
EVA YAKUTIS, CSR No. 5084
Official Court Reporters

[copy missing]

contained lidocaine in the amount of a 23 per cent solution and when the bolus was found, it contained approximately 1100 milligrams of lidocaine and it was marked 100 milligrams.

The technologist from Abbott Laboratories in Chicago testified in this court that the corresponding lot number pulled and tested in Chicago contained a 2 per cent solution; and their opinion was: When the bolus — that was found in the bedcovers — was shipped from the factory in Chicago, it contained a 2 per cent, 100-milligram solution of lidocaine as labeled.

When you consider all the evidence in this case, Your Honor, we have an inescapable conclusion that the People, of course, has met their burden in this case. Furthermore, I feel due to the length, quality and sufficiency of the evidence we introduced here, we have proved, we have met the burden beyond a reasonable doubt.

Thank you.

THE COURT: Thank you, gentlemen, for the arguments.

I want to speak to Mr. Hewatt's statement about an experiment on lidocaine and that this may be an experimental approach.

Mr. Hewatt, I have to say, sir, that I don't believe that the evidence in this case, Dr. Jutzy testified that this was not an experimental type of opinion that he was giving. In fact, he said that it's well known clinically what happens.

It's well documented. It's not experimental, but based upon pathological material.

So, I think that Dr. Jutzy has clearly said that this is not some new experimental device of medicine. This is something well known and accepted.

It's also well known, I believe, that he brought out that you can't experiment with live human beings as to what is a lethal dose. Obviously, that goes to — is contrary to the profession.

I want to take each of these patients and the accounts. But I also want to correct the record in several instances that these nurses saw bottles on Mr. Diaz, and that was at two different hospitals. I believe that's Annette Miller, Race, and Cheville.

Also, as far as Miss Bayless being dead, Dr. Jutzy clearly stated that Miss Bayless was not dead at the time that she received this lidocaine overdose. That she was clearly not dead at the time you've indicated, Mr. Hewatt, and I believe that's clear. In fact, I would like to say that I think on Miss Bayless, the evidence is probably as strong as any of the accounts here as to Mr. Diaz.

So Mr. Diaz understands — and I won't prolong the agony, Mr Diaz — it's my intention, sir, to hold you to answer to all of the accounts in the Complaint. In fact, at one time I considered adding an account which was Ethel Shaw for at least attempted murder on Ethel Shaw because the M.O. is so clear; but I am not going to do that.

First of all, I think you have to all understand that the cause of death was testified to by Dr. Modglin and Dr. Root. Only in one patient, that's Mr. Kean, did the indication come from Dr. Modglin that the heart was and the heart disease was a basic cause of death; but nevertheless, he indicated that lidocaine was a significant contribution to his death and it did shorten his life and that's

all I believe it takes to be a criminal agency that somehow life is shortened.

But in any event on each of those counts, gentlemen, I think that the evidence is very strong. Other than Kean, which I have indicated, would I believe that Dr. Modglin stated was the cause of death, that lidocaine did shorten the life.

I don't think that the Cline count is as strong as some of the others, and I don't think that the Marian Stewart count is as strong as the others; but I do believe that those individuals — Kean, Cline and Stewart — the burden has been met as far as this Court is concerned as far as those three counts are concerned.

I'll just simply say for the record that I have not been in this system as long as a lot of people, but maybe longer than a majority of the people. When we talk about violence, it seems to me this is the most dangerous type of criminal. At least, a person who has a knife and a gun, you know who you have to protect yourself against, but these people all came into this hospital expecting that their lives would be lengthened by this experience; and I think Mr. Diaz is an extremely dangerous man. Whether that's an appropriate comment by me or not, I don't know; but I can't let it pass. I think somebody who is in this kind of medical health and an individual works in an intensive care unit and starts with this type of approach to treating patients, I think that this is the most dangerous type of individual there is.

First of all, because this is a very difficult death to diagnose; and obviously, has been until it became so prevalent at this Perris Hospital, that finally somebody recognized that there was something odd going on here and started to delve in here.

I can't believe that this would not still be going on if this had happened here and there scattered at different times. I don't think anybody would have ever gotten the picture.

MR. LEE: Your Honor, if at the risk of being, perhaps, rude to the Court, may I remind that the Court that the affirmative defense, there has been no affirmative defense here. And certainly what the Court has heard during the course of the past eight weeks is largely the Prosecution's case and the cross-examination of the Prosecution's case by the defense, I do feel that it is inappropriate on the Court's part to characterize Mr. Diaz at this point insofar as his side of the story as we all know has yet to be heard. And with that, I —

THE COURT: You are not being rude, Mr. Lee. I would expect you to tell me that, sir, and I have to agree that only one side of the story is here. I am just simply indicating that the one side that I have seen in my experience, I think, that you have got a very difficult row to hoe, whatever your defense.

The only thing that's disturbing me about this is the issue that you can always tell what the motive is. It's money. It's anger, something of that nature, some personal gain. And out of this whole case, the thing that just totally loses me is I cannot understand what the motive could possibly be. I hadn't figured that out yet.

In any event, I want to get the Complaint here.

MR. LEE: Your Honor, it is my understanding that the — well, it is my understanding that Mr. Diaz is entitled to know that the Court is sufficiently satisfied that there is some competent evidence of each element of the charged offenses.

For purposes of the record, if the Court could indicate for us what it determines to be sufficient evidence for the

elements of the charged offenses, that being the — excuse me, the unlawful killing of a human being with malice aforethought being the elements of 187, that's murder, of the Penal Code.

And also the use of the 1101 (b) evidence as the People have indicated was their theory, it's my understanding that there is a particular burden of proof that the uncharged offenses or the similar offenses must be sufficiently satisfied, and we would also request the Court to indicate for us whether, what burden or what degree of evidence it is determining in using the 1101 (b) evidence.

THE COURT: All right, sir.

Let's take up the 1101 (b) evidence first. And that is Dr. Root's testimony, and I accepted that. And I will accept his testimony beyond a reasonable doubt, not just to the burden of this Court but beyond a reasonable doubt.

As far as the testimony by the nurse, Rita Driver, I believe her statements beyond a reasonable doubt.

As far as the elements are concerned of malice, Mr. Diaz is a certified cardiac care nurse, coronary care nurse with all kinds of experience. He has worked in ICU units, I don't know how many different ones. He is an experienced nurse. No one could give this kind of lidocaine therapy to anyone without knowing exactly what he was doing.

I find beyond a reasonable doubt that all of these individuals died of lidocaine poisoning.

I find beyond a reasonable doubt that each of the cardiologists determining that each of these individuals' deaths were consistent with overdoses of one to two thousand milligrams of lidocaine, I find that beyond a reasonable doubt.

I find Dr. Peat's testimony, the toxicologist, concerning the effects of lidocaine in the body, I see nothing to impeach him. I accept what he said beyond a reasonable doubt.

Let's go through each of these patients.

Count I, Irene Graham. Dorothetta Ernest testified she didn't give anybody any lidocaine. She actually saw Diaz injecting something into his arm at the bedside near or at the time when it was possible that the lidocaine was administered.

Donna MacDonald testified she didn't give anything to Graham in the way of lidocaine.

Sandra Phenicie didn't give anything to Graham, and she was the first to arrive off the med-surg floor responding to the code.

I think that there is a strong suspicion beyond what's required in this particular proceeding to believe that Mr. Diaz injected a lethal dose of lidocaine into Ms. Graham.

On Bernard Kean, although the question of the heart disease, whether a significant contribution, nevertheless, lidocaine shortened the life of this individual. And with the experts testifying that there was a lethal dose administered, Lois Cheville, her testimony was that she was with Mr. Diaz. I believe her statements concerning what happened on the morning hours of the 4th of April are correct.

She had a difficult time with her memory without her charts, but in observing her testify and the manner in which she testified and in particular the manner in which she was cross-examined, I thought she controlled herself exceedingly well with some of the questions that were asked. And I found her to be very believable.

As Beatrice Cline, Donna MacDonald testified that she saw Diaz in and out of the room just before Ms. Cline seized.

And the time, as I understood it, coincided with what the experts testified concerning the administration of lidocaine. And, again, for the purposes of this proceeding and reasonable suspicion, I think it's beyond that point. It's almost beyond a reasonable doubt.

I think that Minnie Lee Dempsey, no question about the expert's testimony of how this lady died. Phenicie testified she didn't administer any lidocaine to Dempsey; no one came into the room an hour before she coded.

Carl Chetlan came in later, didn't know where Mr. Diaz was about two minutes before she seized. Mr. Chetlan also, as a witness, I have to comment on. His memory seemed to be very good on some areas. He left something to be desired as a witness particularly when he decided he was going to change the medical report to protect a friend.

Nevertheless, on cross-examination, I didn't see anything which changed the fact that Mr. Diaz could have been at the bedside of Miss Dempsey just a couple of minutes before she died.

Lynn Race said that Diaz told her that Dempsey was going to code. And he had bottles in his pockets. I don't think there is any question for this proceeding that Mr. Diaz is guilty of that death and should be held to answer for the death of this individual.

Gertrude Bryant, again, the experts, I think, are unimpeachable as to what their opinions were, that she died of a lethal dose of lidocaine. Lidocaine shortened her life.

Again, Lois Cheville testified at length about this particular patient and that Mr. Diaz had given lidocaine to this patient.

Sandra Wingo also testified she didn't give any lidocaine to Bryant. She did some of the rhythm strips; but, basically, she didn't administer any lidocaine to Ms. Bryant. She had a patient named Hammond, which I heard from the testimony didn't fare too well.

Also, Carl Chetlan testified that he did rhythm strips; and Lynn Race, again, testified that Mr. Diaz told her that Bryant was going to code and he was nervous and pacing back and forth.

The evidence is sufficient, again, as far as the burden is concerned here in this preliminary hearing to hold Mr. Diaz for the death of Ms. Bryant.

As far as Count VI is concerned, Mr. Rainwater, a ninety-five-year-old man, lidocaine again shortened his life. Anybody who thinks because you are ninety-five, maybe you are not entitled to any more life; I don't believe that, and I don't think any rational person believes.

Again, the same clinical picture by the experts; Lois Cheville, again, was the nurse who worked with Mr. Diaz, didn't administer any lidocaine to the patient.

Sarla Duller was a registered nurse. She left the room of Mr. Rainwater; Diaz was at the bedside. She was watching the monitors when Rainwater seized. She was only gone a few minutes from the room.

Again, I think that the evidence is ample with all of the evidence other than just Duller.

Silvera, same thing. Gentlemen, if you want me to go through it, I will. I feel that the experts testified that

lidocaine in lethal doses were administered to this individual and that the lidocaine shortened the life.

Lois Cheville was the nurse; didn't give any lidocaine; Diaz was frequently in the room with Mr. Silvera.

Carl Chetlan charted on Silvera all the events of the last code. Silvera seized after Darling infused on the last code; but evidently Mr. Diaz hung the bottle.

Lynn Race said that he told her that Silvera was going to code. And, again, he was nervous and so forth.

Marian Stewart, Count VIII, same expert opinions. Lois Cheville, again, was the nurse on duty and Mr. Diaz and Chetlan; she came in. The vital signs on Ms. Stewart were all right and evidently there was no medications given until the lidocaine was given just before the code; and then 75-milliliter bolus was given just before the code was called. She didn't give any lidocaine during the code. Carl Chetlan gave no lidocaine in the code and the experts testified that this individual received a lethal dose of lidocaine. That leaves Mr. Diaz at the bedside.

Now, as far as Virginia Bayless goes, it's the same story, gentlemen.

Donna MacDonald was the L.V.N.

And I indicate to you now that I was told on argument that Diaz wasn't in the emergency room. He was in the emergency room, according to the testimony. Stroman helped Diaz bring Bayless in from the emergency room between 12:00 and 1:00 o'clock in the morning and flat-lined while she was working on Castro.

Phenicie also testified that no one went into the ICU unit for an hour before the code on Bayless occurred.

And Susan Stroman indicated that Bayless was her patient; Diaz asked her to look at something else — I

can't read my own writing — and she walked out of Bayless' room and Diaz was coming from Castro's room and he looked strange — I don't know what that means — but there was all kinds of problems during this period of time.

Problem that I see here was after Bayless was pronounced, Stroman took the slip of paper with the medications that were used during the code and asked Mr. Diaz what name she should put on the code sheet and he said, "Mar Val."

And she wrote it down on the code sheet. Based on what Ms. McCormick testified to the other day, obviously that was a violation of the hospital rules. I have never learned who Mar Val was, but, again, it's an attempt to falsify a document.

And there's testimony that Mr. Diaz is the one that asked someone to falsify it. It's got to be some consciousness of guilt.

Also, Mr. Diaz in a conversation with Ms. Stroman indicated that there would be a code at 4/15 at 7:10 a.m. that morning. And I don't have to tell you what happened.

Mr. Castro is the same situation. Donna MacDonald. The evidence in my opinion of Mr. Castro is quite strong. We have the thumbprint, and we have the bottle of lidocaine that came back 23 per cent lidocaine that Mr. Diaz asked MacDonald to inject. There is no question that that's the same vial or at least that's beyond a reasonable doubt she has her thumbprint on it. Very strong count, in my opinion.

Bertha Boyce, the doctor was present finally at the last code. Again, what did Mr. Diaz do when he was asked by the doctor to respond on the telephone to him? He never called her back and never told the patient, never told the

doctor what was happening to the patient and was in direct conflict with her order.

Mr. Swanson, Diaz was at Swanson's bedside and walked back with a 3 cc. syringe in his pocket. Toni Todaro also testified that to this count, and, again, it's extremely strong, particularly with the blood that was taken at 3:05 and the blood taken at 5:45 that Mr. Diaz' guilt is more than satisfactorily shown in that count.

And I am going to have to say that I am very close to holding Mr. Diaz to answer to the attempted murder of Ethel Shaw.

But I find that in each of these counts, that the testimony that I have gone over is only a portion of what I have heard, this being its ninth week. And I have not attempted to indicate for the record all of the evidence on any particular count. I simply find that I think the evidence is clear that Mr. Diaz should be held to answer on all of the counts in the Complaint.

Therefore, it appearing to me that the offenses in Count I through XII in the Complaint have been committed and there is sufficient cause to believe that the within named defendant, Robert Ruben Diaz, is guilty thereof, I order that you be held to answer to these charges, Mr. Diaz, and I set your first date in Superior Court on the 15th of September, 8:30 in the morning, Department VII, Judge Lopez. There is still no bail in this case.

Now, I have had one request sometime just before 4:00 o'clock by Mr. Bowman of the Press. He wanted to be heard by the Court if there was a holding order, and I told him I didn't know whether there was going to be one or not. And I don't know whether he's still around.

THE BAILIFF: He is, Your Honor.

THE COURT: Ask him to come in.

MR. HEWATT: Your Honor, I would like to cite Cromer vs Superior Court, 109 Cal. App. 3d, Page 733.

THE COURT: Okay.

MR. HEWATT: 734. And Rosato vs. Superior Court, 51 Cal. App. 3d 190, and ask that —

THE COURT: For what purpose?

MR. HEWATT: The sealing of the preliminary hearing transcript. Those, both those cases stand for, likely, stand for the possibility of if the transcript were released to the public that it would endanger the right of the defendant to have a fair trial. And if there is any reasonable likelihood of any prejudice, that those transcripts should, in fact, be sealed.

THE COURT: Okay. Mr. Bowman, did you want to make some kind of a statement for the record, sir, as far as the Press-Enterprise is concerned?

MR. BOWMAN: Chris Bowman for the Press-Enterprise, Riverside.

The Press-Enterprise would like to request that the transcripts of the preliminary hearing of Robert Diaz be released to the public — I presume you have made a ruling — after the ruling.

THE COURT: No, I have not made a ruling yet. You mean on the holding order?

MR. BOWMAN: On the holding order.

THE COURT: Yes, sir, I have made an order on that. And that's why it's necessary to have you put your statement on the record because the transcript will go across the street. Is there anything else you wanted to say, Mr. Bowman?

MR. BOWMAN: That the matter is of legitimate public interest, and the public and the press has been excluded for the past eight weeks. And that's all.

THE COURT: All right. Thank you.

Mr. Magers, do you want to add anything to the record?

MR. MAGERS: No. I am not familiar with those cases cited by Mr. Hewatt, Your Honor. I will submit it to the Court.

THE COURT: All right. I have to go back to the Deganti case again. I don't remember the exact cite, United States Supreme Court, but it is beyond the statutes of the State of California.

That case holds that a judge or magistrate, be it a trial or be it a preliminary hearing, has an affirmative constitutional duty to insure that a defendant has a fair trial. And even though it may overreach some state statute here, I feel that under that Deganti case which states exactly what my duty is, I have to believe that the only way to protect that right would be to seal the transcript. And I would so order it, based on the citations that Mr. Hewatt has given me and also on the Deganti case.

We have some matters of evidence. I believe that there were some defense exhibits. Would you show those to counsel and ask whether or not they wanted them returned?

MR. LEE: Your Honor, those that have been withdrawn by the defense, we would request they be returned.

THE COURT: All right. They are returned.

SUPERIOR COURT

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS OF FEBRUARY 10, 1983

Appearances:

FOR THE PLAINTIFF: GROVER TRASK, *District Attorney*
By: PATRICK MAGERS, ESQ.
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FOR THE DEFENDANT: MICHAEL LEWIS, *Public Defender*
By: JOHN LEE, ESQ. and PATSI LAHTI
3536 Tenth Street
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ALSO APPEARING: THOMPSON & COLEGATE, *Attorneys at Law*
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Reported By:
KATHERING G. SMITH,
CSR NO. 1685

PROCEEDINGS OF FEBRUARY 10, 1983

THE COURT: Good afternoon.

MR. MAGERS: Good afternoon, Your Honor.

THE COURT: In the matter of People versus Diaz, appearances for the record, please.

MR. MAGERS: Pat Magers appearing for the People.

MR. LEE: Deputy Public Defender John Lee appearing with Mr. Diaz, Your Honor, who's present in custody.

MS. LAHTI: Assistant Public Defender Pat Lahti with Mr. Diaz.

THE COURT: All right. Mr. Lee, I notice you have a tape recorder.

MR. LEE: Yes, Your Honor. There is no tape in it.

THE COURT: Very well.

MR. LEE: I propose, assuming we get that far, to enter into evidence a tape recording as an exhibit in opposition to Mr. Magers's publicity motion. That's the only purpose for it being here, so that the Court might examine the tape itself.

THE COURT: There is a right to have a tape recorder, but I need to know about it.

All right. Our next step, before anything, is to continue with Mr. Diaz's previous matter concerning counsel. And I think I just will hear that, rather than go in chambers, we'll just do this. If you'll remain in the vicinity, we'll call you as soon as we can.

The bailiff will close the court, please.

(Whereupon there was a closed session which was not dictated, and the following proceedings took place in open court.)

THE COURT: All right. I'm no longer a magistrate. I am a judge of the Superior Court. We have some motions in front of us. There's a 995 motion. There are some motions under 1538.5. There is a nonstatutory motion on the part of the People to set aside the previous order of the Court sealing the transcript of the preliminary hearing.

MR. MAGERS: That is correct.

THE COURT: In sequence, do you have any thoughts?

MR. MAGERS: I would suggest that we deal with the People's nonstatutory motion for release of the transcripts.

THE COURT: Mr. Lee?

MR. LEE: Your Honor, it's my understanding that the firm of Thompson & Colegate has entered ostensibly on behalf of the public and filed papers. Procedurally, perhaps we can address that. I do have some comments regarding that. And we can then determine, I think, perhaps if we can determine who the parties are who have standing, as it were, on this particular motion first and then get into the substantive motion itself.

THE COURT: I think that's appropiate.

There has been filed, as of February 7, 1983, a document with the caption of this case, but attorneys for applicant Press-Enterprise Company.

Do you want to be heard with regard to that, Mr. Lee?

MR. LEE: Yes, Your Honor. Mr. Boyd, who filed the papers for, I will call the Press-Enterprise the interveners in this matter, served both myself and Mr. Magers with a copy. And I've had an opportunity to briefly review it.

My position at this point is that they do not have standing to be heard on this matter. They are alleging the right of the people of California, and I believe that the rights and interests of the people of California are amply represented by the presence of Mr. Magers.

I am not familiar with any section of the Penal Code which provides for the appearances of a third party, save for sentencing matters. And I believe that any arguments that can be presented in this matter can be amply done through Mr. Magers.

THE COURT: Is there anyone here from the firm of Thompson & Colegate?

MISS WATERS: Yes, Your Honor, Sharon Waters on behalf of Press-Enterprise.

THE COURT: Miss Waters, do you want to be heard? And I will hear from you. But I want to make it clear at this point how I am hearing you. I am hearing you kind of as a special appearance as to whether or not you can even appear.

MISS WATERS: Yes, Your Honor, I understand that.

THE COURT: Do you understand that?

MISS WATERS: Yes, Your Honor.

THE COURT: There has been filed — And let me point out immediately that the mere fact that a clerk in a ministerial function accepted for filing some document does not mean that it is necessarily properly before the Court. But I do have a document by your office on this subject.

I note in reading this document that it's generalized authority and no specific authority for this procedure,

that is, that any individual can appear as, quote, surrogate for the public and be heard.

Do you have any authority for that particular point?

MISS WATERS: Other than what is contained in the papers, no, Your Honor. We believe that the case of, recent United States Supreme Court case of Richmond Newspapers, which designates the press as the spokesman for the public, is sufficient authority. That in combination with Penal Code Section 868 which now creates a right in the public to attend the preliminary hearing absent a showing of prejudice to the defendant, creates the right, the right of the press as a spokesman for the public.

THE COURT: All right. So that I am clear on the record on this, I am not going to permit you to appear, but in the sense of what we know appearances to be, a party or an intervener by statute or an amicus curiae by leave of court, or perhaps there are some others that I can't think of.

But at this point the District Attorney — I have one People of the State of California client in this case. It's called the plaintiff. It's represented by the District Attorney. And I do not recognize an appearance as a party of any other individual or entity as surrogate for the People.

On the other hand, I have read and reviewed your points and authorities, and I will consider them, and I will consider your argument and point of view in the matter.

MISS WATERS: That would be fine, Your Honor. We appreciate that.

THE COURT: Mr. Lee?

MR. LEE: Your Honor, if the Court is disposed to consider the papers submitted by the Press-Enterprise, I

have additional comments with regard to the points and authorities that they have submitted to the Court.

I would like to add to my previous comments that, assuming that they do have the right to even appear on this particular matter —

THE COURT: I haven't given them that right. I'm hearing them as something special, that I haven't got a name of.

MR. LEE: Okay. They're not appearing.

THE COURT: But I have considered what they have to say.

MR. LEE: Well, in considering what they have to say, Your Honor, the points and authorities rely considerably on revisions to Penal Code 868. However, Penal Code 868 is more than just that one sentence that they are relying upon. That same section of the Penal Code continues to say that where the magistrate is satisfied that the right to a fair trial may be jeopardized — and I'm paraphrasing very broadly here you —

THE COURT: I'm aware of that, counsel.

MR. LEE: That Mr. Diaz's right to a fair trial may be compromised and he may close the preliminary hearing and order the sealing of the transcript.

THE COURT: I do not find any merit in the position of this applicant. However, let's get this in the correct order. There is a moving party here.

MR. LEE: Yes.

THE COURT: Let's hear from the moving party. Let's hear from you in opposition, and then we'll hear something on the other side.

MR. LEE: Very good, Your Honor.

THE COURT: The moving party has the burden, I think.

MR. MAGERS: Thank you, Your Honor. Initially, pursuant to 868 of the Penal Code, Judge Dabney did in fact close the courtroom and seal the transcript. At that particular time, in the beginning of July, 1982, Judge Dabney, through his discretionary ruling, found that it would be in the best interests of Mr. Diaz to do what he then did.

I am assuming that that motion was granted, because Judge Dabney was anticipating a day-by-day account of the proceedings. And, of course, it lasted some 41 days.

At that point in time at the preliminary hearing there were many representatives of television stations and radio stations and newspapers present, and he began anticipating a day-by-day account, and subsequently at that point in time he exercised his discretion and granted the motion pursuant to 868.

However, that's been approximately, what, nine months ago. The case has received very little publicity. And pursuant to the argument I utilized last time, the People do have a right to know, and it's a balancing interest. And because of the passage of time, we feel that the interests of the public has dulled in this case, and we feel that the public's entitled to a summary of what transpired during the nine-week preliminary hearing that took place last summer.

And additionally I am anticipating this case to go to trial some time in the future, not the immediate future, based upon what the defense attorneys have represented to me. And at this particular point in time the People feel that the public's right to know outweighs any possible denial of fair trial that Mr. Diaz may at some point be subjected to.

As far as Mr. Lee's moving papers in opposition, basically he's arguing venue, and I don't think that's necessarily a proper argument. I think the argument is whether or not Mr. Diaz's right to a fair trial will produce some prejudice by releasing the transcript, which is a factual account of admissible evidence of the crimes charged. And based upon that argument, Your Honor, People would ask that not only the transcripts be released but also my points and authorities in opposition to Mr. Lee's motion to dismiss the case, that motion that I filed contains a 40-page summary of the facts, and we would urge the Court to release that to the public, as well.

There's no statutory or case law on a point which would prohibit the Court from doing that. That document was a public document. However, because of the circumstances involved, we felt, the District Attorney's office, felt that we should maintain the status quo until Your Honor made a decision. And we would ask that both documents now be released. Thank you.

THE COURT: All right. Now, Mr. Lee, he's made a motion. You can reply.

MR. LEE: Yes, Your Honor. In my papers that I filed with the Court I expressly reserved the right to introduce additional exhibits and other evidence on this matter. I have submitted to the clerk of the court a total of five exhibits identified A through E and would like to describe them very briefly.

It is true that on the first day of the preliminary hearing Judge Dabney made a ruling, and he based his ruling to close the preliminary hearing on the case of Gannett vs. DePasquale, which is a United States Supreme Court case. Judge Dabney discusses it very briefly on pages 11 and 12 of the transcript, which the Court has a copy of.

Following the conclusion of the preliminary hearing Mr. Hewatt, speaking for Mr. Diaz, moved under the authority of Rosato vs. Superior Court, which is cited in my points and authorities, and also Cromer vs. Superior Court. And I have supplied as Exhibit B that portion of the transcript to the Court.

Additionally, we have Exhibit C, which is certain —

THE COURT: Why don't we take them one at a time.

MR. LEE: Okay.

THE COURT: Any objection to — What is your first exhibit? Exhibit A, is that what you're calling them?

MR. LEE: Exhibit A, Your Honor.

MR. MAGERS: Which —

No, Your Honor.

THE COURT: All right. A will be admitted.

Let's see. You had also done B?

MR. LEE: I believe Exhibit B, Your Honor, is the defense request at the conclusion of the preliminary hearing, pursuant to, under the authority of Rosato and Cromer, but Rosato and Cromer are implied in invoking the authority of Section 938.1b which authorizes the magistrate to seal the transcript. And Exhibit B, I believe that incorporates pages 4235 on through 4237. We have submitted to the clerk and identified that as Exhibit B.

THE COURT: May I see those?

Any objection?

MR. MAGERS: No objection.

THE COURT: You have marked the bottom of page 4235?

MR. LEE: Yes, Your Honor. I have taken the liberty to highlight those portions of the actual conversations that I felt were most material to this motion.

THE COURT: Well, the clerk will be directed to now — we have a pair of scissors — cut off the part that you want and put it in. I don't want any more of that on this page until I make a ruling on the other motion. This being the part of what your motion goes to.

So it is the last sentence on page 4235 and the first, down through line 12 on page 4236. Well, all of page 4236 and 4237. So the only part that would be admitted would be the last line of 4235. Cut off and hand back to counsel and expunge from the record at this point anything above that.

MR. LEE: Thank you, Your Honor.

We have also submitted as Exhibit C the part of the comments of the magistrate following or concurrent with the actual findings of the Court, and that is reported on page 4224, principally, 4224, lines 14 through 27, Your Honor.

THE COURT: Now, that was the part I was looking for. Maybe you want to think a moment as to whether or not you want — The motion is to seal the transcript; it's not to seal any proceedings. And I haven't any intention of sealing any proceedings. And if you want to put this much of the proceedings in, then what have we got a motion for on the other stuff?

MS. LAHTI: Could we briefly confer?

MR. LEE: Your Honor, in order for me to properly argue the motion, these exhibits are necessary. And if we are successful, we intend to request the Court to seal these exhibits, particularly Exhibit C.

THE COURT: All right.

MR. LEE: It is difficult to — I don't want to —

THE COURT: You have at least thought about what the problem is, and you have hoped for solutions. You don't know whether I'm going to do it or not, but you have a hoped for solution.

MR. LEE: Yes, I do, Your Honor.

THE COURT: Proceed. It will be admitted.

MR. LEE: As Exhibit D we have submitted a loose-leaf which contains a collection of newspaper articles, and they begin from approximately April of 1980 and proceed in more or less consecutive month-by-month sequence. The last article in the file is an article which appeared in the, I believe it's the Press-Enterprise some time in December of 1982, just this past December.

THE COURT: Any objection?

MR. MAGERS: No objection.

THE COURT: Be admitted.

MR. LEE: And the last exhibit, identified by the letter E, Your Honor, is a tape of a news broadcast this past Friday, I believe. It's designated 2/4/83; that was broadcast by the radio station KCKC.

THE COURT: Do you have a transcript of that?

MR. LEE: I do not, Your Honor. However, I can provide the Court with the actual tape that we made from it.

THE COURT: I will require a transcript.

MR. LEE: Okay.

THE COURT: I have fallen into the problem of having to listen to tapes and not having transcripts.

MR. LEE: In that case, Your Honor, if, with the Court's permission, we could withdraw the exhibit and put together a transcript for the Court for resubmission perhaps at a later date.

THE COURT: Might as well get it now, because if this is to be reviewed, the Fourth District Court has a rule that there must be a transcript. And after having had some very unsatisfactory experience with having only the tape recently, I will also require a transcript.

MR. LEE: Very good, Your Honor.

Your Honor, I think the —

THE COURT: What I'm saying is, Mr. Lee, you would have to have made that transcript, anyway. We are in the Fourth District, and they will not take a tape without a transcript.

MR. LEE: Very good, Your Honor.

To respond directly to Mr. Magers's previous comments, I would think that in addition to the arguments that I've presented in our opposition papers, there is a case directly on point. That is the case of Gannett vs. DePasquale. And in that particular case, to summarize it very briefly, one of the issues presented to the Court was whether or not there was a public right to be present in pretrial proceedings.

We are not at this stage, at this point, where Mr. Diaz is requesting a closure of his actual trial before a jury.

The case upon which the Press-Enterprise counsel relies upon discusses the closure of a trial. That is Richmond Newspapers vs. the Commonwealth of Virginia, discusses the closure of the trial itself.

At this point in time we are in a definite pretrial status. We are engaged in various pretrial motions. And that

issue as to whether or not the people have a right to appear in those proceedings was directly addressed by the Supreme Court in Gannett. In Gannett the Court determined that because of the nature of the pretrial proceedings, that many evidentiary issues are heard and hopefully resolved prior to trial, that certain constitutional issues, such as the admissibility of evidence under either the Fourth Amendment, perhaps the Fifth Amendment, are litigated in pretrial proceedings, that to permit the public to come in and view those proceedings, to be educated, as it were, as to those proceedings would run the risk — and they use the standard of a reasonable likelihood — if it would create the reasonable likelihood that as a result of the publicity generated by pretrial proceedings, if that would jeopardize Mr. Diaz's right of a fair trial because of the constant inculcation into the prosective jury panel of various facts, allegations, et cetera, about the case, which may be legally inadmissible, then the Court is well advised and, in fact, must, as an affirmative duty to protect Mr. Diaz's right to a fair trial, close the pretrial proceedings.

And I think that a reading of DePasquale would indicate that those proceedings must be closed from the moment of the preliminary hearing, which has already been done by Judge Dabney, all the way through and up to the actual calling of the first witness, at which point Mr. Diaz's public trial would actually commence.

I think that the authority, also, of Corona vs. Superior Court again cited quite extensively and quoted extensively in my moving papers, that Mr. Diaz's case falls very easily, very apparently into those kinds of cases where, even though the media may not come out with an intent to damn him prior to trial, the fact remains that with the constant feeding of little bits and pieces of the issues that will be part of the trial, that there runs the risk of, as the

Court in Corona characterized it, circumstances which tend to create a belief in his guilt. And that is a matter which is properly and will only be before the jury sworn to try Mr. Diaz's case.

I think also that the remarks of the magistrate, were they to be made the subject of commentary for the public, would also severely jeopardize Mr. Diaz's expectations of a fair trial.

In essence, Your Honor, I believe that in addition to everything that I have raised in my moving papers, which I'm sure the Court has read, that Gannett vs. DePasquale is the controlling case. We are in a pretrial situation, that the extent of the publicity in this particular case, the Court will note from an examination of Exhibit D that even the tangential matters involved in this case, the fact that Mr. Diaz has had to endure changes of counsel since his initial arraignment on the felony complaint in Municipal Court through things which are totally unrelated to his case, such as the fact of the marriage of co-counsel Mr. Hewatt on this matter, that becomes all part of the public comment.

The Court will notice that contained in the Exhibit D are articles indicating that Mr. Diaz's wife was briefly held on a traffic warrant. That was apparently reported some time during April of 1982. The prospect of collateral investigations regarding the conduct of the defense has also been commented upon.

So we have, Your Honor, a situation where anything, whether directly or tangentially involving Mr. Diaz, is something which the media, whether it be the Press-Enterprise, whether it be the electronic media, is something that they are constantly interested in. That at every opportunity that something arises that the media feels may be worthy of comment, worthy of broadcast, worthy

of printing, they do in fact do so, and in every instance we are creating a situation where, although perhaps — but I seriously doubt — that the public interest in this case is dulled. I think the only reason it is dulled is because of the discretion of counsel for both sides and the fact that Judge Dabney's previous order sealing the transcript remains in full force and effect.

I think that once that guarantee, that protective order is lifted, we will be treated to a blow-by-blow account of the preliminary hearing.

The Court is also aware that the purpose of a preliminary hearing is merely to establish probable cause to bind the defendant over. It is not a determination of guilt, and it is not a determination even of innocence but is merely a determination as to a basic legal sufficiency.

Given the fact that we have an extensive preliminary hearing that the People had several months to prepare, investigate their case, why, it is natural that the result of the preliminary hearing, and given the relative late date that the defense begins, that we're going to have quite a bit of prejudicial material but arguably admissible material, appearing in the preliminary hearing transcript. And there is no way — and the Supreme Court of both this state and of the United States has recognized it is very, very difficult to cleanse the minds of the prospective jurors of the effects of pretrial publicity.

In this particular case Mr. Diaz is facing capital charges. The California Supreme Court in Martinez has specifically said that, taking into account the kinds of pretrial publicity and the consequences to the defendant, that the balance must be struck in the favor of Mr. Diaz. Thank you, Your Honor.

MR. MAGERS: Just briefly, Your Honor. As far as the facts in the preliminary hearing are concerned, it was

admissible evidence, competent, substantial, admissible evidence. And basically that's what will be released, a factual account of admissible evidence.

The defense filed a 1538.5 to supress evidence they contend was illegally seized. That's fine. It has nothing to do with the preliminary hearing testimony or evidence. The evidence secured at Mr. Diaz's house pursuant to a search warrant was not introduced at the preliminary hearing. The facts were ruled upon by Judge Dabney. And if there are any newspaper accounts concerning the preliminary hearing transcript, it would be a factual recitation of what happened. And we will submit it on that.

THE COURT: Do you want to be heard?

MISS WATERS: Yes, Your Honor. The constitutional right of the public, it is true, is primarily directed at the public trial. But we believe that Penal Code Section 868 reverses the role at the determination of whether to open or close the hearing.

The burden in this situation is now on the defendant to prove that it will prejudice his rights. The presumption is now in favor of openness in public and recognition of the public's right to know and their need to know.

It is true in this situation there is a lot of public interest, and it is exactly this type of case which requires the information to be made available to the public, so that the public understands all that is going through with the trial, and that they have a full understanding of the judicial process.

In this situation the preliminary transcript from my understanding is quite extensive. And it is doubtful that all of the blow-by-blow accounts that Mr. Lee is referring to, that you would have a factual recitation of the preliminary evidence.

Also, Your Honor, the seven articles that have been printed so far, two of which have been at the instigation of the defense counsel, have occurred over a six-month trial period. And it is doubtful that the preliminary transcript, once published in shortened form in the newspaper, will have any serious effect on the defendant's ability to get a fair trial.

Mr. Lee's affidavit in this respect is nothing more than conclusionary. What has occurred in the past is no indication of what will occur in the beginning. And in this situation it is important to recognize the public's right and interest in attending the preliminary trial by making the transcript available to them at this stage.

The prejudice at this point cannot be determined. What has taken place is not indicative of what will take place. And the remedies available to the defendant — although we would be reluctant to see a motion for change of venue granted — are still available in the event the publicity that the defendant is so concerned about is so extensive.

But in the final analysis the burden is on the defendant, although the People are the ones making the motion in this situation, in light of the recent amendment in Penal Code Section 868. Thank you, Your Honor.

THE COURT: Anything further?

MR. LEE: Yes, Your Honor. First, I feel it necessary to respond to the 868 issue. I think the 868 issue is, one, moot. It is, two, a qualified right. Three, the record of the preliminary hearing, the comments of Judge Dabney, clearly indicate that exercising his discretion on July 6th, when the very first day of this preliminary hearing he made the determination upon then available information that Mr. Diaz's right of a fair trial would be unduly compromised by opening the preliminary hearing. And I think what any party attacking the 868 ruling by Judge

Dabney must do is to show an abuse of discretion. And I have not seen any evidence indicating that there has in fact been an abuse of Judge Dabney's discretion with regard to that particular ruling.

It is true that Mr. Diaz does arguably have a right to a change of venue. However, Mr. Diaz also has a right, a correlative right of having the case tried in this county where he and his counsel believe, based upon present information, that he may expect a full and fair trial, based upon fairly admissible evidence, fully litigated by both sides before a jury empaneled and seated in this county. That, granted, we could go to another county, but why not obey that traditional common law rule that a crime shall be tried in the venue that it was allegedly committed.

And that is perhaps an unusual position for defense to take at this point in time, but it is a position that we intelligently take, based upon present information. And a lot of our present feeling that we have a reasonable expectation of such a fair trial relies upon the continued status quo, that the evidence which is being challenged through the 995 now pending before this Court, through the 1538.5, and other motions which I can assure Your Honor and Mr. Magers will be raised prior to the date of trial, can be fully litigated, that any exposure, pretrial exposure of that, of those proceedings, will render the efforts that Judge Dabney has attempted, that counsel has attempted to this date, moot, because we will totally wash away all the benefits of having the public, having had this lengthy period of time to sort out, to perhaps forget to a certain degree, some of the, what I would characterize as somewhat outrageous remarks that were made very early in the beginning of this investigation.

There were press conferences being conducted by representatives of the coroner's office, of the District Attorney's office, very early on. There were comments to the

press on both sides. And it very easily raises the spector that the respective sides will try the case in the papers. And that is not in the best interests of Mr. Diaz, certainly not in the best interests of the judicial system that we all adhere to.

I think that Mr. Diaz's right to trial must be a fair one, not in the press and not based upon happenstance of what the media chooses to publish, what they choose not to publish. And the only summary that is presently available immediately for public consumption is that that has been filed by Mr. Magers for the Court pursuant to the 995 motion.

And Mr. Magers, representing the People, certainly will state the case fairly, I'm sure. I'm not saying that he is misrepresenting anything to the Court. But he is, nevertheless, an advocate for one party. And for that statement consisting of 40 some odd pages very detailed and quite lengthy, to go into the public domain, just creates too great a risk. It creates that reasonable likelihood of compromising Mr. Diaz's right to a fair trial.

And I would point out to the Court that the, I believe it is the Supreme Court has held in Martinez that a reasonable likelihood means more probable than not. Which suggests to me that a prima facie showing which I believe the exhibits will demonstrate, a prima facie showing that there is a reasonably likelihood of not receiving a fair trial, that Mr. Diaz is entitled to the appropriately phrased protective orders, and that the standard for protective orders, which is essentially what we're asking for at this point, is the same standard as for change of venue. And I believe the authority for that is set out in Younger vs. Superior Court. I believe I did not cite Younger in my points and authorities. However, I'd be glad to supply the Court with the citation. That the standard for requesting protective pretrial orders, perhaps sometimes inartfully called gag orders, is the same as the standard for change of venue.

THE COURT: You cited it at the bottom of page 11.

MR. LEE: Summarizing, Your Honor, I believe that after the Court examines the exhibits that we have submitted, that there is in fact a reasonable likelihood that any pretrial disclosure will introduce into the public comment facts, statements, circumstances which tend to create the belief, an unjustified belief but nevertheless a belief in the guilt of the accused. That because of this possibility, that it prejudices Mr. Diaz's right to be tried properly by admissible evidence and argument before a fair and impartial jury, in other words, a jury who can legitimately respond to the Court's questions, to counsel's questions, that know they have no preconceived concept as to the guilt or innocence. That Mr. Diaz, because this is a capital case, that is a crucial factor to be weighed, and that the resolution of any doubt be in his favor because of the very special nature of this particular prosecution.

And, finally, under the authority of Gannett that there is no constitutionally recognized right of public attendance in pretrial proceedings. And unless something horribly catastrophic should happen between now and the date of trial, Your Honor, I can assure the Court that the trial of Mr. Diaz will be a full one and will be a public one. But I will not, and I cannot countenance any suggestion that the areas which must be litigated prior to trial be produced for public comment and to the detriment of Mr. Diaz. Thank you.

THE COURT: Anything further?

MR. MAGERS: Just one comment, Your Honor. I don't have to remind the Court that there is no gag order in effect on this case. And I have certainly chosen not to divulge to the media by interview or otherwise as to what

the evidence was at the preliminary hearing or to summarize to any representative of the news media what the testimony was. I chose not to do that. However, I could have, and I still can.

People feel that the best vehicle to allow the public to know what's going on is to divulge the facts in the case as adduced at the preliminary hearing and not speculation or conclusion.

And as far as Mr. Lee's arguments, they would best be addressed to a change of venue. And I don't think they're necessarily appropriate at this stage.

At some point in time if Mr. Lee feels that Mr. Diaz's rights to a fair trial have been compromised in this jurisdiction, then he has the vehicle to apply to this belief. I will submit it on that.

THE COURT: Well, I think Mr. Lee is going a little bit further. Nothing new to you on this.

He is also asserting he has a right to a trial in this county and not having to go because of prejudicial pretrial publicity, and that this Court has a duty to look forward to the posture of the case at the time of trial and see whether or not he can have a trial in his county of residence, where his witnesses are, where his loved ones are, since he's in custody.

MR. MAGERS: Is —

THE COURT: It's the opposite side of that. In other words, he is saying he should not be compelled — True, as you've indicated, frequently the approach is, "Well, if it doesn't work out right, you can always delay it long enough, or you can kick it over and try it in another county." And he says, "I don't want to delay it any further, and I have a right to try it in this county."

MISS WATERS: Mr. Lee's pointed out that Judge Dabney's earlier ruling, he did find that an open preliminary hearing would prejudice his rights.

It was also noted in Mr. Lee's moving papers that no opposition was made by the District Attorney at the earlier request to close the hearing, which is exactly why the Press-Enterprise and the press in general feel they have a right to voice their position in this respect, those situations where the D.A. does not have —

THE COURT: Well, you are aware that Mr. Bauman was allowed to be heard in regard to that.

MISS WATERS: Yes, Your Honor.

THE COURT: So press did get a say in before Judge Dabney, at least from what I read from the transcript.

MISS WATERS: Additionally, the Gannett decision primarily addressed whether the public had a Sixth Amendment right to attend the trial. And it's true the Gannett decision decided that there was no public Sixth Amendment right to attend the trial.

With respect to the issue of whether it was a First Amendment right, I believe the Court did not actually address that question but merely said that even if there was one to attend the public trial, that this was a preliminary hearing and further that any interest of the public was recognized, because a transcript was made available.

And I think that situation is analogous here. The distinction between making the transcript available and having the blow-by-blow account that Mr. Magers (sic) has referred to is a very important distinction, because a daily recounting of what is occurring in the preliminary hearing would obviously or could obviously affect the defendant's right to a fair trial.

A summary of the facts which was prepared of a several month preliminary hearing, the impact is going to be lessened, the public's right to know will be fulfilled, the impact on the defendant will be limited. If there's any impact at all, which is, as I stated earlier, at this point we're merely speculating. Until the articles are written, until the impact is determined, at this stage from Mr. Lee's investigation, the defendant will have a fair trial in here.

The press is not interested in changing the venue in this situation any more than the defendant is, because it would be necessary for them to schedule coverage for a year and a half in another jurisdiction, which would obviously be a great expense to them. But it is the principle involved here of the public's right to know, the harm of releasing the transcript is certainly not as great as would have been if the preliminary hearing had been open at all times. Thank you, Your Honor.

THE COURT: Well, the Court feels compelled under the authority of Gannett to consider several points. First of all, that this is pretrial proceedings, and it's not trial. That whether it is inflammatory type of publicity or merely repetitive factual comments, it has an effect upon the community mind which affects the community pool from which the jurors are selected.

The Court has no objection to the public's right to know. And I think Mr. Magers's initial observations, that as to the evidence he produced, it was as factual as it could be. Just, we'll use — It's not extremely inflammatory or exciting type of facts in this.

But I find it quite easy under Gannett to see that there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's

right to a fair and impartial trial. And I will order that the transcript remain sealed.

I believe all concerned here — This Court certainly is aware that the defendant has interjected a new concept of a defendant's right, at least as far as I know, and yet it's not a new one. We all know that a defendant has a right to be tried in the jurisdiction in which the act occurred. And as an arraigning magistrate I've had to inform defendants of that right many, many times. He's just carrying that to the ultimate now. He has a right to be tried in this jurisdiction. And so far at this point he's saying, "There being no more publicity from this point than there is, as things now stand, I think I can stay here. And please, judge, don't do something that will impact upon my trial, so that I can't have a fair and impartial trial here, so that I have to go somewhere else. Because if you send me somewhere else, I've been told it's going to be about an 18-month's trial, I've got umpteen witnesses that I'll have to have there, I am in custody because this is a special circumstances case, I do not have a right to bail, and my loved ones would have to come to me, and there's so much publicity in the south here that, pray tell, where would you send me except hundreds of miles away?"

It is quite easy for me to find that there is a reasonable likelihood that making all or any part of the transcripts public might prejudice the defendant's right to a fair and impartial trial. The decisions, authorities, supplied by defense counsel also give me the implicit authority, and thereunder I do exercise inherent authority to prevent the same mischief.

I will order sealed that portion of the District Attorney's motion that was a synopsis of the facts. Now, when saying that, let me hasten to say that there was nothing untoward in the District Attorney's doing that. Well, I have had to go through the transcript. Nevertheless, his

synopsis is of extreme value, and certainly nowhere am I suggesting that the District Attorney made the synopsis so that, although the transcript was sealed, he could get around it in that fashion.

MR. LEE: Well, Your Honor, —

THE COURT: I am not suggesting that at all.

MR. LEE: And I think it ought to be quite perfectly clear, neither are we.

THE COURT: All right. But I am ordering it sealed. I am ordering the evidence, the documentary evidence you have submitted in support of this motion, insofar as it contains extracts from the transcript of the preliminary hearing, sealed.

I have not done a gag order. I do not intend to impose one. I hope I do not.

I simply bring out again that the defendant is bringing forward a new emphasis upon his right to be tried in the jurisdiction in which the incident occurred. And should state acts jeopardize that, I am assuming that his defense attorney is knowledgeable enough to make motions on it. Although, like I say, I do not have a gag order.

All right. Next matter? Let's take a moment. Let's take a brief recess. I have a sentencing, do I not? All right. Let's take about a 10- or 15-minute recess.

(Whereupon a recess was taken in the proceedings.)

MR. LEE: Your Honor, just one more matter, as a matter of housekeeping on the last motion. I think it was implicit in the Court's comments that subsequent pretrial hearings would also be closed. But I don't recall hearing that made explicit. Perhaps for purposes of clarification —

THE COURT: I have not made that order.

MR. LEE: We would then, Your Honor, as a logical extension — because I really cannot see arguing many of the evidentiary issues and particularly the 995 argument that is certainly upcoming and the 1538.5, without referring directly to substantial portions of the preliminary hearing transcript and other aspects of the case.

THE COURT: Well, I've read your 995 motion, and it doesn't look to me like you're going to go through a combing through the details of it. There's a couple areas of law but not an awful lot of facts that would be disclosed by your motion, as I understand your points and authorities and your statement of the case in support of it.

The traverse, I don't know that the search warrant and return has ever been sealed.

MR. MAGERS: The 1538.5 that Mr. Lee has filed is a renewal of a motion that was filed in the Chino Municipal Court. And that was fully litigated in open court. All that information has been disseminated to the public a year and a half, two years ago, and the affidavit in support of the search warrant was made public two years ago.

MR. LEE: Your Honor, Mr. Magers is correct as to his statements there. However, once again, we're running into a situation of having these issues brought up again before the public's eye.

And as to each, what we would request leave of the Court to do is that at each successive time that we are presenting one motion or the other to the Court, if we could at that time address the Court as to the issues of whether or not that proceeding should be closed to the public.

THE COURT: Well, you have that right, and you are making it now.

MR. LEE: Yes, Your Honor.

THE COURT: As to this.

MR. LEE: My feeling, Your Honor, is that Gannett does fairly well cover, implicit in Gannett is the fact that it covers all pretrial proceedings. And I feel that this case is fairly well controlled by the dictates of Gannett.

THE COURT: I am not going to exclude the public from ongoing motions. I cannot find that that would have a reasonable likelihood of impairing this trial. The contrary would. If I were to seal it, it would just be a reason to exclude the public from an ongoing proceeding now after preliminary hearing, where there is a statutory right, would simply be to make news in and of itself, which is equally, I think, is even more likelihood of preventing your client from being able to have a fair trial. And balancing that against the right of the public in ongoing criminal proceedings, at least at this point I'm going to deny your motion.

MS. LAHTI: Am I clear with the Court that this is something that you will hear us, renewed?

THE COURT: Each time.

MS. LAHTI: Thank you. And I would like the Court to know that part of our difficulty is anticipating what we found ourselves doing this afternoon, arguing in the abstract. We presented the Court with documentary items and could not refer specifically without disclosure. And we're going to be facing the same situation with Mr. Magers's summary and —

THE COURT: On the 995 I think we can handle it.

October 4, 1983

Honorable Justices of the Fourth District
Court of Appeals, Division Two
303 Third Street
San Bernardino, California

Re: Press-Enterprise Company vs. Superior Court of the State of California, In and For the County of Riverside, Respondent, Robert R. Diaz, Real Party in Interest; 4 CIV 29785, County Number CR-19899.

Your Honors:

The above matter has been calendared for hearing before this court on October 5, 1983 following the submission of briefs by counsel for Petitioner, Real Party in Interest and Amicus. Prior to oral argument of the action, this court should be appraised of factual events that may affect the court's resolution of the matter now pending.

On September 30, 1983, the Honorable John H. Barnard, trial judge of the underlying criminal prosecution, accepted Mr. Diaz's waiver of jury trial pursuant to Article I § 16 and granted his request to proceed to trial with Judge Barnard as the trier of fact for both guilt phase and penalty phase, if necessary. Following the trial court's acceptance of the waiver of jury trial, Judge Barnard indicated his intention to lift his order closing the preliminary hearing transcript in Mr. Diaz's case. He expressed the opinion that such order was now moot in light of the waiver and he retained jurisdiction to lift his previous order. Defense counsel requested maintenance of the status quo until the proceedings before this tribunal are completed. Judge Barnard agreed to maintain the status quo until October 5, 1983 at 1:30 P.M. whereupon he would hear additional argument from counsel.

At first blush the aforementioned waiver may render the instant proceedings for mandamus moot, this is not, however, the contention of counsel for the Real Party in Interest, Robert R. Diaz.

The California Supreme Court has held in numerous instances that issues presented in a given case are not rendered moot despite events occurring during the pendency of the matter where the issues are of broad public interest. See *In re William M.*, 3 Ca. 3d 16, 23 (1970). this exception to the traditional mootness doctrine has been applied in actions involving writs. See Willaim M., supra, (habeas corpus); *Zeilinga v. Nelson,* 4 Cal.3d 716, 620 (1971); *Kirtowsky v. Superior Court,* 143 C.A.2d 745, 749 (1956) (mandamus); *United Farm Workers v. Superior Court,* 14 Cal.3d 902, 906-907 (1975) (prohibition).

It is readily apparent from the record of the instant case that all parties would concede that the issues raised herein are of broad public interest, i.e. Petitioner's First Amendment claims versus Mr. Diaz's specific (and all persons similarly situated) right of trial in an untained atmosphere. Although orders as that challenged here are infrequent, the effect is far reaching in its potential to alter defense strategies and tactics and their availability is a crucial item in a trial counsel's quiver to ensure the preservation of his client's rights of due process.

Counsel, therefore, urges this court to retain its jurisdiction of the instant petition and further render such orders and opinions as may be consistent with resolution of the issues raised herein. Should the court require

additional authority or argument on the mootness issue adequate time to prepare same is hereby requested.

Respectfully,

JOHN J. LEE
Deputy Public Defender
Counsel for Robert R. Diaz
Real Party in Interest